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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-30

UNITED STATES ex rel. THOMAS SOLOMAN,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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United States ex rel. Theron Soloman,

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v.

Commonwealth of Pennsylvania,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Theron Soloman, petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review their decision affirming the opinion of the federal district court which denied habeas corpus relief to Petitioner. Your Petitioner was convicted in a Pennsylvania state court for a marijuana and firearm charge on January 23, 1967. In state appellate proceedings and before the district court and court of appeals below the Petitioner has consistently challenged the legality of the search warrant procedures utilized by the state officers who arrested him.

OPINIONS BELOW

The Order and Memorandum Opinion of the United States District Court for the Middle District of

Pennsylvania on Petitioner's application for habeas corpus relief are unreported. They are appended here as Appendix A. The Judgment - Order and decision re Petition for Rehearing of the United States Court of Appeals for the Third Circuit which affirmed the district court's denial of habeas corpus relief are similarly unreported. They are appended here as Appendix B.

JURISDICTION

The order sought to be reviewed was made and entered by the United States Court of Appeals on April 27, 1973. An order denying a timely petition for rehearing was made and entered on May 31, 1973. The action of the Court of Appeals affirmed the denial of habeas corpus relief by the United States District Court for the Middle District of Pennsylvania which issued its order denying a petition for such relief on December 31, 1971 and which was followed by a memorandum opinion filed on March 13, 1972.

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question is 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Amendment of the United States Constitution may permit a state magistrate to establish probable cause for a search warrant on the basis of sworn oral testimony, not contemporaneously recorded, which supports a written complaint for a search warrant which of itself is inadequate for probable cause.

2. Whether an "admission against penal interest" by an unidentified narcotics informant may serve as the sole underlying circumstance for a state narcotic agent to conclude the informant is reliable for probable cause purposes under Aguilar v. Texas, 378 U.S. 108 (1954).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, United States Constitution, provides that "...no Warrants shall issue, but upon probable cause, supported by Oath or affirmation...."

STATEMENT OF THE CASE

The Petitioner, Theron Soloman, petitions from federal court orders which denied habeas corpus relief from state convictions for unlawful possession of marijuana and an unregistered firearm (35a). The unlawful offenses occurred in Wilkes-Barre, Pennsylvania during the late evening of May 19, 1966. Following execution of a search warrant on Petitioner for his car, the Petitioner admitted he had an unloaded and clipless .22 calibre handgun in the glove compartment of his car (30a-31a; 32a-33a). A search of Petitioner and with Petitioner's cooperation, a search of Petitioner's home and his brother's home failed to produce a key to the trunk of Petitioner's car (29a-30a). After a master key was obtained from a garage, a search of the trunk of Petitioner's car revealed an unknown quantity of marijuana in a bag.

Earlier in the evening of May 19, 1966 a state narcotic agent, Edward Slosky, has appeared

before Justice of the Peace Stephen R. Stefanides of Swoyersville, Pennsylvania, to request a search warrant for Petitioner's home and car. The complaint for the search warrant merely stated the conclusion that "....based on reliable information from a confidential informant...." the Petitioner had possessed or sold marijuana six days earlier on May 13, 1966 (3a). This was the sole incriminating information contained in the complaint.

At suppression hearings before the trial court, however, the narcotic agent and the magistrate were permitted to testify as to sworn unrecorded oral statements, not contained in the search warrant complaint, given by the agent to the magistrate on May 19, 1966 which lead the magistrate to issue the search warrant for Petitioner's car.

At a suppression hearing held on October 28, 1966 the magistrate testified that he was not given the informant's name when he issued the search warrant (8a).

At a subsequent hearing on January 18, 1967 the state narcotic agent testified that the only other information given to the magistrate on May 19, 1966 was that a sale of marijuana occurred on May 13, 1966, six days earlier, between an informant and a third party, Daniel Salvaterra. The agent related that the informant had driven Salvaterra to the parked vehicle of the Petitioner from which the informant obtained marijuana (16a). The only corroboration by state agents of Petitioner's involvement in criminal activity prior to issuance of the search warrant was that the substance given by Salvaterra to the informant was marijuana (16a-17a).

At the second suppression hearing, the magistrate confirmed the sworn unrecorded oral testimony of the state narcotic agent. However, when the magistrate issued the search warrant for Petitioner, the magistrate admitted he also found probable cause based on unsworn allegations given to him by other parties on previous occasions that the Petitioner and Salvaterra were connected (23a).

Following an unfavorable verdict and post-trial motions, Petitioner was sentenced on December 13, 1967 by the trial court. Although never previously, or subsequently, arrested for any other crime, the Petitioner received concurrent terms of one to two years on the firearm charge, and two to four years on the marijuana charge. The Petitioner has been on bail for 5 years during the appellate review of this case.

Petitioner has consistently challenged the constitutional propriety of supplementing the search warrant complaint with unrecorded oral testimony to establish probable cause before the state magistrate. More importantly, even if the unrecorded oral testimony were permitted, Petitioner contends the sworn oral and written allegations, taken together, do not establish probable cause. This is especially true since these allegations were tainted by the unsworn information given by third parties to the magistrate at other times.

On May 22, 1969 the Pennsylvania Superior Court affirmed the convictions, without opinion, in a per curiam decision. The Pennsylvania Supreme Court denied allowance of an appeal on December 18, 1969. Federal habeas corpus relief

pursuant to 28 U.S.C. § 2254 was sought and denied by district court order on December 31, 1971 and was joined by a memorandum decision filed on March 16, 1972 (36a). The Third Circuit affirmed the district court on April 27, 1973 (56a) and denied a petition for re-hearing on May 31, 1973 (58a).

POINT I

THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION CANNOT PERMIT A STATE MAGISTRATE TO ESTABLISH PROBABLE CAUSE FOR A SEARCH WARRANT BASED ON UNRECORDED SWORN ORAL TESTIMONY GIVEN BY A STATE NARCOTIC AGENT TO SUPPORT AN OTHERWISE INADEQUATELY WRITTEN SEARCH WARRANT COMPLAINT.

The Fourth Amendment provides that "...no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,..." Pennsylvania has upheld local procedure which permits sworn before a magistrate to supplement facts contained in the affidavit for a finding of probable cause. Commonwealth v. Crawley, 209 Pa. Super. 70, 223 A.2d 885 (1966).

In the instant case, the complaint for a search warrant was merely conclusory as to evidence of Appellant's complicity in crime, and, by itself, was not probable cause for a search warrant (3a). Aguilar v. Texas, 378 U.S. 108 (1964); Nathanson v. United States, 290 U.S. 41,47 (1933). But where the affidavit alone for a search warrant is inadequate, federal courts have deferred to state law which permits review of unrecorded oral testimony given to the issuing authority to support a probable cause finding for a warrant. Miller v. Sigler, 353 F.2d 424 (8th Cit. 1965); see also United States ex rel. Boyance v. Myers, 270 F. Supp. 734 (E.D. Pa. 1967), rev'd on other grounds, 398 F.2d 896 n. 1 (1968).

Some federal courts have concluded it would be "preferable" or the "better practice" to require the recording of all sworn facts for the application for a search warrant. United States v. Berkus, 428 F.2d 1148, 1152 (8th Cir. 1970); Commonwealth ex rel. Feiling v. Sincavage, 313 F. Supp. 967, 970 (W.D. Pa. 1970).

Some states by local rule are similar to Federal Rule of Criminal Procedure 41(c) and require the recording of all testimony for search warrant applications. E.g., United States v. Berkus, 428 F.2d 1148, 1150 (8th Cir. 1970) (Minnesota); State v. Beal, 40 Wis. 2d 607, 162 N.W.2d 640 (1968).

For federal warrants under F. Rule Crim. P. 41(c), all the supporting information must appear in the affidavit. United States v. Sterling, 369 F. 2d 799 n.2 (3d. Cir. 1966). See also Commonwealth v. Milliken, --Pa.--, 300 A.2d 78, 80-82 (1973). (Pennsylvania rule not of constitutional proportions, but new local rule similar to federal practice to be prospectively adopted.)

In a Washington case, certiorari was sought to the Supreme Court to review whether a state magistrate must record all testimony prior to issuance of a search warrant. While certiorari was denied, two dissenting members of the Court thought a substantial constitutional issue was presented, Mr. Justice Brennan joined by Mr. Justice Marshall wrote:

"The substantive right created by

> the requirement of probable cause is hardly accorded full sweep without an effective procedural review of a determination by the issuing magistrate of the existence of probable cause. Reliance on a record prepared after the fact involves a hazard of impairment of that right".
>
> Christofferson v. Washington, 393 U.S. 1090 (1969) (dissenting opinion)

In the instant case, the issuing magistrate testified at the second state supression hearing that he not only relied on the sworn oral statements of a state narcotic agent for probable case on May 19, 1966 but he also relied on statements given to him on prior occasions by State Police. See Appendix at 23, 24a-25a.

The Court of Appeals at the original hearing directed attention to the opinion of the district court below which stated

> "The testimony at the second hearing established, and this court so finds, that all information furnished to Stefanides, both oral and written, and particularily that given by Narcotic's Agent Slosky, was given under oath".

See Appendix at 45a.

The Court of Appeals apparently assumed that

the district court found that the information given to the magistrate prior to May 19, 1966 by State Police was also given under oath. This assumption is erroneous and was raised in the Petition for Re-hearing. The September 16, 1971 Order of the district court which set a hearing date of September 23, 1971 for resolution of this issue was limited to

> "...the issue of whether or not the officers who appeared before Justice of the Peace Stephen R. Stefanides on May 19, 1966, were under oath when they informed him of matters not appearing in the search warrant complaint."

(emphasis supplied) See Exhibit "A"

Similarly, the Minutes of Trial or Hearing, for September 23, 1971 stated the nature of the hearing as

> "on issue of whether or not the officers who appeared before Justice of the Peace were under oath when search warrant was prepared".

(emphasis supplied) See Exhibit "B".

The record of the hearing on September 23, 1971 was not transcribed although counsel for appellant has twice requested the reporter's cooperation in this regard. The Minutes, however, demonstrate that no State Police testified as to

whether their information regarding appellant's activity were given under oath on any occasion prior to May 19, 1966 the evening on which the search warrant was prepared. See Exhibit "B".

In United States ex rel. Gaugler v. Brierley, --F2d---, (3d. Cir. No. 72-1262, Opinion of April 16, 1973), the Third Circuit upheld the constitutionality of the Pennsylvania rule which permits the probable cause finding to be made by a state magistrate on the basis of sworn oral testimony which supplements facts contained in a written affidavit. That opinion, however, as with similar federal appellate decisions, limited this rule to only those instances where the oral information was under oath or affirmation. Id. at 12.

In the instant case, there is no basis in fact for concluding that the information given by State Police to the magistrate prior to May 19, 1966, the issuing date of the search warrant, was under oath. Recently, the Court of Appeals for the Sixth Circuit, in Tabasko v. Barton, 472 F.2d 871 (6th Cir. 1972), granted habeas corpus to an Ohio prisoner where there was a lack of showing of any oath or affirmation to support oral evidence relied upon to establish probable cause for issuance of a search warrant. A contrary district court ruling was held clearly erroneous, which is the standard of review. Id. at 874. And, the introduction of such evidence was not harmless error. Id. at 875.

We earnestly contend the instant case falls within the Tabasko rule and should be similarly

resolved. The issue has not be answered with authority by the Supreme Court and the Petition for Certiorari should be granted.

POINT II

A MERE "ADMISSION AGAINST PENAL INTEREST" BY AN UNIDENTIFIED NARCOTIC INFORMANT IS NOT A SUFFICIENT UNDERLYING CIRCUMSTANCE FOR A STATE NARCOTIC AGENT TO CONCLUDE THE INFORMANT WAS RELIABLE FOR THE PURPOSE OF SUPPORTING PROBABLE CAUSE FOR A SEARCH WARRANT COMPLAINT.

The second question is whether the reliability prong of the two-prong Aguilar test for probable cause was met. That test applies where an unidentified informant is the source for the facts and circumstances underlying a search warrant. Aguilar v. Texas, 378 U.S. 108, 114 (1964).

In the instant case, the informant related a purchase of marijuana between him and a third party, Daniel Salvaterra. The sale occurred at appellant's automobile during appellant's apparent presence. Evidently, this "admission against penal interest" is the sole criteria for the finding of reliability to satisfy Aguilar. And, Harris v. United States, 403 U.S. 573, 583 (1971) is believed to support this result.

However, Harris was a plurality opinion. The Justices were split 4-4 on whether an "admission" evidenced reliability. But, there was other information in Harris which coupled with the "admission" lead to affirmance of the conviction in that case. There, the affiant officers knew of the defendant's criminal reputation. Harris held that the affiant's knowledge of defendant's reputation may be evidence

of reliability when coupled with the "admission". To this extent, the Court overruled Spinelli v. United States, 393 U.S. 410 (1969).

In the instant case, only the "admission", and no other coupling information, stands for evidence of reliability. A majority of the Supreme Court has not ruled on this point. Harris was evenly divided and should not be controlling. Affirmance of a judgment by an equally divided court is not authoritative precedent. United States v. Pink, 315 U.S. 215, 216 (1941); Hertz v. Woodman, 218 U.S. 205 (1910). Similarly, where a majority concur only in the result, the principles enunciated in the opinion cannot be considered within the rule of stare decisis. Off v. United States, 35 F2d 222 (D. Ill. 1929).

United States ex rel. Di Rienzo v. Yeager, 443 F.2d 228, 230 (3d Cir. 1971), stated that

> "As to Melillo's reliability, the most prominent feature is that Melillo's admission is against his own penal interest. See United States v. Harris, 403 U.S. 573,(1971), 91 S. Ct. 2075, 29 L. Ed. 2d 723". (emphasis original).

The use of the prefactory "see", if standard citation form is followed, means that the authority cited may suggest the desired proposition. But, Di Rienzo should not be controlling since that opinion did demonstrate corroborative factors, in addition to the admission, in order to find reliability. Id. at 231.

Importantly, Di Rienzo concerned a known

crime, not an informant's prediction of criminal activity. See United States v. Marihart, 472 F.2d 809, 815 (8th Cir. 1972). Narcotic informants "....credibility may often be suspect" and "..... some supporting information concerning credibility of informants in narcotics cases may be required .. "Jaben v. United States, 381 U.S. 214, 224 (1965).

And, the detail to which the informant related is not evidence of reliability. This goes to the "basis of knowledge" test or the first-prong of Aguilar, which is not challenged here. United States v. Marihart, 472 F2d 809 (8th Cir. 1972).

We contend therefore that there is no controlling authority for the proposition that an "admission" evidences reliability under Aguilar. And, in fact, evidence in addition to an "admission" is required for reliability where an informant involved in criminal activity is the source for probable cause. No additional factor is present here.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

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Counsel for Petitioner

COUNTY OF LUZERNE)
) SS;
COMMONWEALTH OF PENNSYLVANIA)

AFFIDAVIT OF SERVICE

I, F. Charles Petrillo, Esq., counsel for Petitioner, being duly sworn according to law, affirms that on June 27, 1973 I served three (3) copies of the within Petition, personally, in accordance with Supreme Court Rule 33.3(c) on the counsel for Respondent, District Attorney Patrick J. Toole, Jr., Esq., Luzerne County Courthouse, North River Street, Wilkes-Barre, Pa. 18701 (717) 823-6161. This is the only party required to be served.

F. Charles Petrillo, Esq.

Sworn to and subscribed
before me this 27th day
of June, 1973.

Emily Bartosewich

NOTARY PUBLIC
WILKES-BARRE, LUZERNE CO., PA
MY COMMISSION EXPIRES SEPT. 30, 1974

APPELLANT'S APPENDIX

I. DOCKET ENTRIES

1. May 27, 1966, Transcript of Magistrate filed against Appellant for unlawful possession of marihuana and unregistered firearm.
2. August 17, 1966, Luzerne County Grand Jury finds true bill.
3. December 12, 1966, Order filed denying motion to suppress evidence.
4. January 18, 1967, Defendant pleads not guilty.
5. January 20, 1967, Motion to suppress evidence denied after hearing.
6. January 23, 1967, Defendant found guilty to both counts.
7. January 27, 1967, Motions for New Trial, and Arrest of Judgment filed.
8. December 7, 1967, Motions for New Trial, and Arrest of Judgment denied.
9. December 13, 1967, Defendant sentenced.
10. December 22, 1967, Petition to Superior Court to appeal filed.
11. May 22, 1969, Per Curiam order of Superior Court. Sentence affirmed.

Docket Entries

12. October 6, 1969, Petition for Allocatur to Supreme Court filed.

13. December 18, 1969, Allocatur denied.

14. February 18, 1970, Petition for writ of habeas corpus filed to Middle District of Pennsylvania.

15. December 31, 1971, Petition denied.

16. March 13, 1972, Memorandum decision filed.

17. March 22, 1972, Notice of Appeal to Third Circuit.

18. April 27, 1973, Third Circuit Judgment - Order affirms dirtrict court

19. May 31, 1973, Petition for Re-hearing denied.

II. SEARCH WARRANT COMPLAINT

Commonwealth of Pennsylvania,
County of Luzerne, ss:

On the 19th day of May 1966, before Stephan R. Stefanides Esquire one of the Justice (sic) of the Peace in and for said County personally appeared Edward Slosky (Narcotic Agent) who, being duly sworn according to law, both depose and say that, in the County aforesaid, that based on a complaint and verification which he veribly [sic] believes to be true, that there is probable cause to believe, and just reasonable grounds believing and does believe that Marihuana and Dangerious [sic] Drugs and Contraband, that have no legal right or use, "Contrary to Section 693, Section 4, Paragraph (q) of September 26, 1961, P. L. 1664." are on the premises of one Theron Solomon, Alias "Rats", situated at 57 Dagobert Street, Wilkes-Barre, Penna. (Described as a two story wooden frame building with green and asbestos siding.) And or are in a 1964 Tan colored Oldsmobile Sedan bearing Pennsylvania Registration Plates No. N-21608, registered in the name of Theron Solomon, and or are in any motor vehicle occupied or operated by the said Theron Solomon Alias "Rats", and based on reliable information from a confidential informant and verified that Theron Solomon Alias "Rats" possessed and sold Marihuana, Dangerious [sic] Drugs and Contraband on May 13, 1966. AFFIANT therefore prays that Search Warrant may issue to a proper

officer directing him to search said place or thing and seize said thing or things.

/s/ Edward A. Slosky
Pennsylvania Department of Health Enforcement Officer

Sworn to and subscribed before me, this 19th day of May, 1966

/s/ Stephan R. Stefanides (Seal)
Justice of the Peace

III. SUPPRESSION HEARING OF OCTOBER 28, 1966

Testimony of Magistrate Stephen R. Stefanides, and Narcotic Agent Edward Slosky at suppression hearing of October 28, 1966.

Appearances

Arthur L. Piccone, Esq., First Assistant District Attorney, for Commonwealth

Daniel F. Daley, Esq., for Defendant

* * * * * * * *

(2) THE COURT: I think the record should indicate that we are considering a motion to suppress certain evidence, and the warrant of arrest, in 1599 of 1966 and 1600 of 1966. The facts agreed upon by both the defendant and the office of the District Attorney are, as follows: that a request for a search warrant was made by one Edward Slosky, a narcotic agent, to Justice of the Peace Stephen R. Stefanides, a copy of which is attached hereto and made a part hereof and marked Defendant's Exhibit No. 1; that pursuant to this search warrant complaint, the aforesaid Stephen R. Stefanides issued a search warrant and a body warrant to the aforesaid Edward Slosky; that as a result thereof, certain goods, to-wit, marijuana and a .22 caliber automatic revolver, HI-Standard Model A, serial number 91579, were obtained and found

in the possession of the defendant, and concurrently therewith the defendant was apprehended. Is that a fair statement of the facts to date?

MR. PICCONE: Yes, Your Honor.

MR. DALEY: Yes, Your Honor.

THE COURT: All right. The motions to suppress were directed to this Court as the trial judge. The defendant's motion to suppress contains certain allegations which have been filed in this matter and are of record. We shall therefore proceed to take such testimony as may be relevant thereto.

STEPHEN R. STEFANIDES, called as witness for the Commonwealth, sworn:

Direct Examination

BY MR. PICCONE:

Q. You are Stephen R. Stefanides, from Swoyersville, Pennsylvania?

A. That's right.

Q. And you are a duly elected Justice of the Peace from Swoyersville, is that correct?

A. That's right.

Q. And you are the same Justice of the Peace that on May 19, 1966 (3) one Edward Slosky came before to request a search warrant, is that correct?

A. That's correct.

Q. I show you what is attached to the record and marked Defendant's Exhibit No. 1, a copy of a Complaint

for Search Warrant, and ask you whether or not that is the Warrant, or the Complaint for Search Warrant presented to you by Officer Slosky?

A. That's correct.

Q. And that is your signature that appears on the bottom?

A. (Witness examined the signature in question.) Definitely, yes.

Q. I ask you, Mr. Stefanides, whether or not at the time this was presented to you, whether Officer Slosky told you and gave you the fact that this search warrant was based on reliable information from a confidential informant and verified that Theron Solomon, alias "Rats", possessed and sold marijuana, dangerous drugs and contraband, on May 13, 1966. Did he make that statement to you?

A. Yes, he did.

Q. And did he give you information relative to that?

A. Yes, he did.

MR. PICCONE: Mr. Daley?

Cross-Examination

BY MR. DALEY:

Q. Mr. Stefanides, you have stated that on May 19 you issued a search warrant pursuant to an application made to you by Edward A. Slosky, is that correct?

A. That's correct.

Q. Mr. Stefanides, on May 19, 1966, did Mr. Slosky inform you of the underlying circumstances pertaining to this alleged incident?

A. Yes, he did.

Q. And by informing you of the alleged underlying circumstances, did you then make a neutral and detached function as a Justice of the Peace of Luzerne County and state that reasonable cause had been made out?

A. Yes, I did.

(4) Q. Mr. Stefanides, did you make this neutral and detached function in determination of reasonable cause, based upon the information that was given to you by the affiant, Edward Slosky?

A. Yes, I did.

Q. And did he disclose to you the name of the confidential informant and verify that this confidential informant had information indicating that one Theron Solomon, alias "Rats," possessed and sold marijuana, dangerous drugs, and contraband on May 13, 1966?

A. No, he didn't give me the confidential informant's name.

Q. He did not give you the confidential informant's name?

A. No, he didn't.

Q. And based upon this information can you state to me today the name of this confidential informant?

A. No, I cannot. It wasn't revealed to me.

MR. DALEY: That's all I have.

(Witness excused.)

EDWARD A. SLOSKY, called as witness for the Commonwealth, sworn:

Direct Examination

BY MR. PICCONE:

Q. You are Edward Slosky, is that correct?

A. Yes, sir.

Q. By whom are you employed?

A. Pennsylvania Department of Health.

Q. In what capacity?

A. Narcotic Agent.

Q. And whether or not you went before Justice of the Peace Stephen R. Stefanides on May 19, 1966?

A. I did.

Q. And at that time did you present to him a Search Warrant Complaint?

A. Yes, sir.

Q. I show you what has been marked for the record Defendant's Exhibit No. 1 and ask you whether or not that is, in fact, a true copy of what you presented to Squire Stefanides?

A. Yes, sir, it is.

(5) Q. At the time you presented this to Squire Stefanides, whether or not you told him and gave him information relative to the fact that your request for search warrant was based on reliable information from a confidential informant and verified that Theron Solomon, alias "Rats," possessed and sold marijuana, dangerous drugs and contraband on May 13, 1966?

A. This is true.

Q. Did you relate and tell Squire Stefanides the information which you had verified and which was the basis of allegation in the search?

A. I did.

MR. PICCONE: Cross-examine.

Cross-Examination

BY MR. DALEY:

Q. Mr. Slosky, you are employed by the Commonwealth of Pennsylvania?

A. That is correct, sir.

Q. What is your position with the Commonwealth of Pennsylvania?

A. Narcotic Agent.

Q. And how long have you been so employed?

A. Four years and two months.

Q. For the past four years and two months, Mr. Slosky, have you been working in the Luzerne County area?

A. Yes, sir.

Q. On May 19, 1966, Mr. Slosky, did you present yourself to Justice of the Peace Stephen R. Stefanides in Swoyersville Borough?

A. Yes, I did.

Q. And what was the purpose of your visit to Mr. Stefanides' office?

A. To obtain a search warrant.

Q. To obtain a search warrant?

A. That's correct, and an arrest warrant.

Q. You made an application for a search warrant to Justice of the Peace Stephen Stefanides?

A. I did.

(6) Q. Did you disclose and inform him of the underlying circumstances pertaining to this alleged incident?

A. I did.

Q. You didn't?

A. I did.

Q. Oh, I'm sorry. You did?

A. Yes.

Q. In this application for the search warrant it is contained therein that based upon reliable information from a confidential informant and verified that Theron Solomon, alias "Rats," possessed and sold marijuana, dangerous drugs and contraband on May 13, 1966. Did you supply Mr. Stefanides with this information?

A. I did.

Q. Did you supply Mr. Stefanides with the name of the confidential informant?

A. No, I did not.

Q. Can you today, in open court, inform me the name of this confidential informant upon which you base this information?

A. This is against public policy, sir.

MR. DALEY: No further questions.

(Witness excused.)

MR. DALEY: At this time I would like to move that my motions for the suppression of evidence filed to No. 1599 and 1600 of 1966 in the Criminal Courts of Luzerne County, be sustained and that the name of the confidential informant as contained in the application for the search warrant dated May 19, 1966, which alleged

to have reputed that one "Rats" Solomon possessed and sold marijuana on May 13, 1966, be disclosed to me. At this time, Your Honor, for the record, I cite the cases of Commonwealth vs. Carter, 422 Pa. 246, in an opinion by Judge Watkins, at page 250, wherein the Court states that where the disclosure of an informant's identity is relevant and helpful to the defense of an accused, or is essential to a fair (7) determination of the cause, the privilege must give way. And citing in support of that proposition, I state the case of Gilmore vs. United States, cited at 256 Fed. 2d, at page 565; and Rovinaro vs. United States, 353 U.S., at page 53.

MR. PICCONE: Obviously, we are resisting the motion.

THE COURT: Is there anything further, gentlemen?

MR. PICCONE: No, Your Honor.

MR. DALEY: I have nothing further, Your Honor.

THE COURT: Then this hearing stands adjourned. (12:00 noon.)

IV. SUPPRESSION HEARING OF JANUARY 20, 1967

Testimony of Narcotic Agent Edward Slosky and Magistrate Stephen R. Stefanides at suppression hearing of January 20, 1967.

Appearances

Arthur L. Piccone, Esq., First Assistant District Attorney, for Commonwealth

Daniel F. Daley, Esq., for Defendant

* * * * * * *

Now, Friday, January 20, 1967, at 9:50 a.m., Court resumed in Court Room No. 3, Luzerne County Court House, Wilkes-Barre, Pennsylvania, Judge Brominski presiding in the absence of the Jury. Defendant present in person and represented by counsel.

BY THE COURT: Let the record indicate that the Defendant in the above-captioned matter had previously filed a motion to suppress the evidence, to wit, marihuana and a gun; that this Court conducted a preliminary hearing on the matter (2) and at that time there was some misunderstanding as to the matters to be raised at that hearing.

Defense counsel indicated at that time, inadvertently or otherwise, that he had pursued only the theory that

Commonwealth was obliged to reveal the name of the confidential informant, reference to whom is made in the application for the search warrant. At the pre-trial conference in the matter, defense counsel indicated that he had not strenuously pursued the probable cause necessary for the issuance of a search warrant and requested this Court to conduct another hearing to determine the probable cause for the issuance of the search warrant and the Court agreed to conduct this hearing this morning outside of the hearing of the Jury in order to make this determination. Is that right?

MR. PICCONE: Good.

MR. DALEY: Fine.

EDWARD SLOSKY called in behalf of Commonwealth and duly sworn.

Direct Examination

BY MR. PICCONE:

Q. Mr. Slosky, state your full name for the record?

A. Edward A. Slosky.

Q. By whom are you employed?

A. Pennsylvania Department of Health.

Q. In what capacity?

A. Narcotic Agent.

Q. Were you so employed in that capacity on the date of May 19th, 1966?

A. I was.

Q. Whether or not on that date you appeared before Justice of the Peace Stephen Stefanides in Swoyerville?

A. I did.

Q. Whether or not at that time when you appeared before Squire (3) Stefanides you presented to him an application for a search warrant?

A. I did.

Q. And—

I think we should put this into the record now, your Honor.

BY THE COURT: The original application?

MR. PICCONE: The original application.

BY THE COURT: I don't believe there's any problem there, is there? Mr. Daley?

MR. PICCONE: As to the original application?

MR. DALEY: No, your Honor.

MR. PICCONE: This is the original from—it's part of the file.

MR. DALEY: All right, this is the application he presented?

MR. PICCONE: Yes. I haven't had him identify it but this is the one that's in the file.

Q. Mr. Slosky, I'm going to show you a paper which is entitled at the top, Search Warrant Complaint, and ask you to look at it. Are you familiar with that, Mr. Slosky?

A. Yes, sir.

Q. Does your name appear on it?

A. It does.

Q. And is that your name in the lower right-hand corner?

A. That's right.

Q. As Edward A. Slosky?

A. That's correct.

Q. Whether or not, Mr. Slosky, this was presented to Squire Stefanides when you went to his home on the evening of the date in question, May the 19th?

(4) A. Yes.

Q. Whether or not at that time you had any conversations with or made any statements to Mr. Stefanides concerning the paper in front of you?

A. Yes, I did.

Q. I will ask you now to relate to the Court as best you can remember what statement was made to Squire Stefanides at the time this search warrant complaint was presented to him?

A. Well, I advised Mr. Stefanides that we had an informant who had purchased marihuana in the City of Wilkes-Barre on May the 13th, 1966, this informant had picked up one Daniel Salvaterra and had driven to a parking lot in South Wilkes-Barre where Mr. Salvaterra got out of our informant's car, went to a car, a tan Oldsmobile driven by the Defendant, Mr. Solomon, picked up a package and delivered it back to our informant.

Q. If I might interrupt you, this package was obtained by Mr. Salvaterra from the Defendant, Theron Solomon?

A. This is correct.

Q. At the time of this transfer of this package Mr. Solomon was in what type of a car?

A. He was in a tan Oldsmobile, according to the informant.

Q. According to the informant, and did you later receive from the informant the particular package which he had received from Mr. Salvaterra?

A. The package was turned over to the State Police.

Q. To the State Police?

A. Yes.

Q. Did you come in contact with the package at all?

A. I did.

Q. Did you look into the pack to determine what if any, what the (5) contents were?

A. I examined the contents under a microscope and found it to be marihuana.

Q. How long have you been a narcotic agent?

A. About approximately four and a half years.

Q. Have you had any training in the field relative to drugs and various narcotics?

A. I have been in the drug field for approximately 20 years.

Q. For approximately 20 years?

A. Yes.

Q. Have you ever seen marihuana before?

A. Yes, sir, I have.

Q. Ever examined it before?

A. Many times.

Q. Based on your experience and background and on your examination of what was contained in the package, that your informant gave you, did you reach a conclusion as to what was contained in that package?

MR. DALEY: Your Honor, at this time I object to this; this man is not qualifed as a chemist or a botanist or a biologist to be able to make a microscopic examination as required.

MR. PICCONE: I have case law where known addicts who are familiar with narcotics are able to give an opinion relative to what the contents of a particular thing was.

BY THE COURT: You said known addicts?

MR. PICCONE: Known addicts or people who have dealt or used with narcotics.

BY THE COURT: Well, we'll allow it only for this particular reason, I don't think we're here this morning to prove beyond a reasonable doubt, we're here as to what the informant had advised the witness and what examination he made and we will allow it and (6) overrule the objection and note an exception for the Defendant.

MR. PICCONE:

Q. Then based on information given to you by your informant, purchased approximately six days before the date you appeared before Squire Stefanides, you prepared this search warrant, is that correct?

A. That's right.

Q. Your application for search warrant, is that correct?

A. This is correct.

Q. And this information which you just related to the Court was in fact told to Squire Stefanides on the evening that you presented your application?

A. It was.

Cross-examine.

Cross-Examination

BY MR. DALEY:

Q. Mr. Slosky, you stated that on May 13th, a sale of a drug or narcotic known as marihuana was made between a Mr. Salvaterra and your informant?

A. That is correct.

Q. And your informant purchased, purchased this, did he not?

A. He did.

Q. And your informant was given this package and this marihuana by a man by the name of Salvaterra?

A. That is correct.

Q. And these are the facts that you told Mr. Stefanides on May 19th, 1966?

A. That is correct.

Q. Now, sir, this application which has been identified by you, was that presented to Mr. Stefanides by you?

A. It was presented by me and Mr. Peters, of the Pennsylvania (7) State Police.

Q. You prepared the application for the warrant prior to getting to Mr. Stefanides' office?

A. No, both Mr. Peters and myself.

Q. You typed this information? Yourself?

A. No, I didn't, no, I related this.

Q. You related this information which is contained in this application for a search warrant?

A. That's correct.

Q. And this is all you related plus what you just told me now?

A. To the best of my knowledge it is.

If the Court please, at this time I again move that my motion to suppress the evidence as obtained in this search warrant be granted, for the following reasons: first of all, the application contained herein as identified by Mr. Slosky here, the narcotics agent, merely states that based upon reliable information from a confidential informant and verified that Theron Solomon possessed and sold marihuana and daugerous drugs and contraband on May 13th, 1966, the facts just produced by this witness who was the Commonwealth's witness support that Theron Solomon did not sell but rather one Daniel Salvaterra sold, there is not sufficient evidence here today to show any possession or control of any drug or narcotic by the Defendant in these proceedings, Theron Solomon.

BY THE COURT: Anything further?

MR. DALEY: That plus the cases which we have cited today and the Commonwealth relies on.

BY THE COURT: Well, don't cite your authority, I am familiar with those cases. Anything beyond that particular point?

MR. DALEY: Just, your Honor, this, that there is not sufficient probable cause to fortify the oath or affirmation contained in this application.

(8) BY THE COURT: All right, I have that.

Order
S. R. Stefanides—Direct

MR. DALEY: Or by the verbal testimony.

BY THE COURT: Motion denied, note an exception. Anything further?

MR. DALEY: I am finished with Mr. Slosky.

(Witness excused.)

STEPHEN STEFANIDES called in behalf of Commonwealth and duly sworn.

Direct Examination

BY MR. PICCONE:

Q. Would you state your full name for the record?

A. Stephen Stefanides.

Q. Do you hold any official capacity or job in the Borough of Swoyerville?

A. No, I don't.

Q. Are you a duly elected official in the Borough of Swoyerville?

A. Yes, I am.

Q. And what is the office you hold?

A. Justice of the Peace.

Q. Whether or not on the date of May the 19th, 1966, one Edward Slosky came to your office in Swoyerville?

A. Yes, sir, he did.

Q. And I will show you a statement, or a paper entitled, Search Warrant Complaint, and ask you to look at it, Mr. Stefanides? Are you familiar with it?

A. Yes, I am.

Q. Do you know of your own knowledge who prepared that information on that paper?

A. Mr. Slosky prepared it, I typed it.

Q. Was this done at your office?

A. Yes, it was.

Q. In Swoyerville?

(9) A. Yes.

Q. On the date indicated?

A. Yes, sir.

Q. All right, you have been in Court this morning since we convened, have you not?

A. Yes.

Q. Whether or not you heard Mr. Slosky testify?

A. Yes, sir, I did.

Q. Whether or not this information coupled with the information which appears on the paper before you, was given to you by Mr. Slosky on the date of May the 19th, 1966?

A. Yes, it was.

Q. He informed you of the various circumstances or information which his confidential informant had given him?

A. Yes, he did.

Q. And the other information which appears on the complaint for search warrant, is that correct?

A. That's correct.

Q. And based on this information, both on the paper and orally received, whether or not you issued a search warrant?

A. Yes, I did.

Cross-Examination

BY MR. DALEY:

Q. Mr. Stefanides, the information you orally received from Mr. Slosky on May 19th, 1966, pertained to the fact that an informant said Mr. Salvaterra sold marihuana, is that correct?

A. Mr. Salvaterra and Solomon were connected in this together.

BY THE COURT: Now, Squire, just answer the question, directly. Would you read the question back, please?

Q. (Read by the Stenographer) Mr. Stefanides, the information (10) you orally received from Mr. Slosky on May 19th, 1966, pertained to the fact that an informant said Mr. Salvaterra sold marihuana, is that correct?

A. That's right.

Q. And Mr. Stefanides, based upon this oral information given to you by Mr. Slosky plus the verbal information he gave you which is embodied in this application for a warrant, you then issued this warrant, did you not?

A. Yes, I did.

Q. And you issued a warrant, sir, which contains the charge that one Theron Solomon sold and possessed marihuana?

A. That's correct.

Q. Now we have before us today the testimony of Mr. Slosky and the testimony of yourself and we have nothing to indicate that Mr. Solomon sold marihuana, do we?

MR. PICCONE: Objection.

BY THE COURT: Mr. Daley, we're not here to make out the crime of the sale of marihuana, we're here on the issue of probable cause as to the issuance of a search warrant. I think you're well aware of the circumstances that if this were a trial surrounding the sale of marihuana your question might be pertinent. If you're asking it as general information we will allow it and I think you understand that certainly one who participates could be found guilty but we're not here to decide that particular issue today, only probable cause. Now, I want to allow you as much latitude as possible but I want to indicate, I want the record to indicate in what particular light we're talking about the circumstances.

MR. DALEY: All right, your Honor, I'm getting just this basis point of probable cause for the issuance of the warrant.

BY THE COURT: All right, fine, just as we're all mindful (11) of that particular circumstance.

MR. DALEY:

Q. And based upon this information this warrant was issued?

A. That's correct.

Q. And there was nothing else except what Mr. Slosky told you verbally and what he had printed on that form?

A. That's right, I had other knowledge that they were connect, both together, Solomon and—

Q. Where did you gain this knowledge, Mr. Stefanides?

A. Through the State Police and Slosky.

Q. On May 19th, 1966?

A. No, prior occasions.

Q. Well, we're not concerned with what happened prior, Mr. Stefanides, I'm concerned with what happened on May the 19th, 1966, the only information you had was the verbal testimony given to you by Mr. Slosky and the information contained in this application for a warrant, is that correct?

A. That's correct.

Q. And again to clarify this, Mr. Stefanides, you were told what you were told was the fact that from the informant that is the information was given to Mr. Slosky that one Daniel Salvaterra delivered, surrendered or sold to the informant, is that correct?

A. Correct.

Q. Yes?

A. Yes.

That's all I have, Your Honor.

Redirect Examination

BY MR. PICCONE:

Q. Mr. Stefanides, did anyone else accompany Mr. Slosky to your office?

A. Roy Peters.

(12) Q. Corporal Roy Peters, would that be him?

A. Right, that's correct.

All right, thank you, nothing further.

(Witness excused.)

Additional Reasons To Renew Motion Ruling

MR. PICCONE: Commonwealth has no further testimony to offer, your Honor, on probable cause.

BY THE COURT: Very well.

MR. DALEY: Again, at this time, your Honor, I again renew my motion.

BY THE COURT: You renew your motion, do you have any additional reasons for it?

MR. DALEY: Yes, your Honor, based upon all the testimony given here this morning and based upon the printed information given in the application for the warrant, based upon the verbal testimony herein, we don't have sufficient probable cause that the Defendant herein, Theron Solomon, possessed or sold marihuana on May 13, 1966. The only verbal testimony given to us today by Mr. Slosky from an alleged informant in which it was shown and was not proven by the Commonwealth that this informant was reliable or credible, was that one Daniel Salvaterra possessed and sold on May 13th, not that the individual defendant herein, Theron Solomon, sold and possessed, and based upon this I feel that the Commonwealth has not made out probable cause for the issuance of this warrant and I request that the motion to suppress be granted.

BY THE COURT: The Court finds as a finding of fact that on May 13th, 1966, a sale of marihuana was consummated between a confidential informant and one Daniel Salvaterra; that the sale

surrounded the extraction of the marihuana from the motor vehicle of the Defendant, Theron Solomon.

The Court therefore finds as a conclusion of law, that (13) there was probable cause for the issuance of the search warrant and denies the Defendant's motion to suppress and notes the Defendant an exception.

The Court further directs that this record be impounded and made available only to the Defendant, Defendant's counsel, the office of the District Attorney or the Court. Anything further?

MR. DALEY: Nothing, your Honor.

MR. PICCONE: No, Judge.

BY THE COURT: What we'll do is we'll adjourn for a few minutes and we shall reconvene the Jury in the Jury box and proceed with the trial in the matter.

Now, 10:15 a.m., Hearing concluded.

* * * * * * *

V. SELECTED TESTIMONY

Testimony at Appellant's trial on January 20, 1967 relating cross-examination of Corporal Roy Peters, Pennsylvania State Police, one of the officers who arrested Appellant the evening of May 19, 1966.

Appearances

Arthur L. Piccone, Esq., First Assistant District Attorney of Luzerne County, for Commonwealth.

Daniel F. Daley, Esq., for Defendant.

CORPORAL ROY PETERS, having been duly sworn according to law, testified on cross-examination as follows:

BY MR. DALEY:

* * * * * * *

(12) Q. And at this time Mr. Solomon was sitting there?

A. That's correct; he was sitting there when we first arrived; what he did, his movement in between the time I was talking to Daniel Salvaterra until the time that I took him over and he was present when we searched his car, I didn't know exactly where he was standing, but in the area of Salvaterra's car.

Q. Now, isn't it true, Trooper, Mr. Solomon did get out of the vehicle that he was sitting in and he was standing outside this vehicle and he was searched of his person?

MR. PICCONE: I would object at this stage—

A. I did not, I don't know.

MR. DALEY:

Q. You did not search his person?

A. I was, as I said, concerned with Daniel Salvaterra.

Q. Well then, Corporal, may I ask you this, when your attention then focused on Mr. Solomon, did you then search his vehicle?

A. That's correct.

Q. And did he surrender a key to this vehicle to you or to any member of your detail?

A. I don't recollect exactly relative to the key; no, I don't recollect; he didn't surrender it to me as I recollect; he may have; I don't know.

Q. On cross-examination, Corporal, or direct examination, sir, you stated that Mr. Solomon attempted to open the glove compartment and the trunk portion?

A. I recollected that, yes, he was in the car, and he was fooling around with the trunk, with the keys that he had.

Q. He was cooperative, was he not, Corporal?

(13) A. He was very cooperative.

Q. And upon not being able to open either the glove portion of this vehicle or the trunk portion of the vehicle, he then took you to his home, did he not?

A. He did not take me; Mr. Slosky accompanied him.

Q. But he drove his own motor vehicle to his home?

A. That was under our directions, yes.

Q. And he looked for the key to this trunk there?

A. Correct.

Q. And further, not finding it there he went further and went to his brother's home, is that correct?

A. That is correct.

Q. Did he offer or make any suggestions that he break open these locks for you by the use of a bar or any other device?

A. No, we did not want to damage his car and we did not suggest that he break it open but we insisted that he would have to open it.

Q. Corporal Peters, I'm not stating that you suggested or requested that he break it open; I'm asking whether or not Mr. Solomon volunteered that he would break it open if you wanted to see anything?

A. I don't recollect; he may have.

Q. He may have?

A. Yes, we let him know that we wanted him to open the trunk; it was part of the search warrant and part of the search.

Q. Did he also prior to opening the glove compartment, admit to you that this .22 pistol was in the glove compartment?

A. Yes, he acknowledged that there would be found an automatic pistol in the glove compartment.

Q. He didn't hide it at all, did he, Corporal?

A. He didn't hide it except for the fact that he failed to have (14) the keys for the compartment or the trunk.

Q. He didn't have the keys in his possession?

A. That's what he said.

Q. But he told you that if upon opening this glove compartment, this pistol would be found?

A. That's correct.

Q. Now, like all other weapons, this pistol carries a serial number, does it not, Corporal?

A. That's correct.

Q. Have you ever checked that serial number out?

A. Yes, that has been checked with Harrisburg.

Q. And is that serial number contain any relationship to an owner of that pistol?

A. Yes,—

MR. PICCONE: If you need something, Corporal Peters, come down here and get it.

A. We checked it with Harrisburg—this is a report of June 1, 1966, from the Crime Laboratory, Harrisburg, relative to the Defendant's violation of the Uniform Firearms Act, one calibre .22 long rifle, model A, high standard, automatic loading pistol, serial number 91579, results of examination, Exhibit No. 1 was test fired and found to be in good firing condition. Paragraph 2, a check of the Pennsylvania State Police gun file showed a notation wherein a permit to carry was issued to one Elisha Wandell, Benton, R. D. No. 1, Pennsylvania, for the years 1954, '56, '58 and '59. This is signed by E. H. Caruthers, from the Crime Laboratory.

MR. DALEY:

Q. Therefore, Corporal, from your investigation as to the serial number and identification of that pistol, it was not registered (15) nor identified with the Defendant here, was it not?

A. That's correct.

Q. Now, Corporal, also on May 19th, 1966, you stated that Mr. Solomon was cooperative to you and told you that you would find this pistol in the glove compartment and upon opening the glove compartment at a subsequent time you did find it, did you not?

A. Yes, I can elaborate, that he did not tell us the marihuana was in the trunk of the car before.

Q. I didn't ask you that question, Corporal; I asked you whether or not he told you the pistol would be found?

A. That's correct; he spoke of it.

Q. And he freely admitted it, did he not?

A. He did.

Q. Now, you have demonstrated to the Court and to the Jury that this pistol can be fired without a clip; now, a clip would be the clip of bullets which would go into this part of the pistol, would it not, sir?

A. Right.

Q. And then by placing the clip of bullets into the pistol it can then be fired automatically?

A. Several times, correct.

Q. This is similar to what we've all been acquainted to in the United States Army by the M-1 Rifle, is it not?

A. It would be compared with that.

Q. The M-1 Rifle, we were instructed in the operation, firing, dismantling, handling of the gun, and in that rifle there was a clip which you would put in and it would fire automatically eight times, if my memory serves me correct?

A. That is probably true; I didn't handle an M-1 so I would be no expert with that.

(16) Q. And also, Corporal, that weapon, like this weapon, can be fired singly or automatically, is that correct?

A. I presume, if you say so.

Q. Corporal, from your investigation, search of this vehicle, you found no bullets, did you?

A. No, I didn't.

Q. You found no clip?

A. No, I did not.

Q. All you found was the pistol?

A. That's correct.

Q. And Corporal, you have stated that this young man was under surveillance and by virtue of this surveillance the search warrant was obtained on the date of May the 19th?

A. That's correct.

MR. PICCONE: Now, I object, your Honor, I don't think that's a correct statement.

BY THE COURT: Would you read the question, please?

Q. (Read by the Stenographer) And Corporal, you have stated that this young man was under surveillance and by virtue of this surveillance the search warrant was obtained on the date of May the 19th?

BY THE COURT: Is there something wrong with that?

MR. PICCONE: I object; I don't think that's the Trooper's testimony, that Mr. Peters testified that as a result of the surveillance a search warrant was obtained. That's my recollection.

BY THE COURT: There is no testimony to that effect.

MR. PICCONE: That's right; that's why I object to the form of the question only.

BY THE COURT: Sustained.

VI ORDER OF DISTRICT COURT

ORDER

Petitioner, Theron Soloman, having filed a petition for a writ of habeas corpus, and an answer having been filed by the respondent, and after hearing, and a review of the State court records, and having considered the pleadings, the briefs and oral arguments of counsel,

It is ORDERED that the petition is denied.

There is probable cause for appeal.

(s) Michael H. Sheridan
Chief Judge
Middle District of Pennsylvania

Dated: December 31, 1971

VII. MEMORANDUM OPINION

MEMORANDUM

Petitioner, Theron Soloman, has filed a petition for a writ of habeas corpus on the ground a search warrant was illegal.

In 1966, petitioner was indicted in the courts of Luzerne County for the unlawful carrying of a concealed weapon and for unlawful possession and control of a narcotic drug, marihuana. The offenses occurred on May 19, 1966. After trial by jury held in January 1967, petitioner was found guilty of both offenses. In December 1967, after post-trial motions were denied, he was sentenced to concurrent terms of imprisonment of one to two years on the unlawful possession of a firearm and two to four years on the marihuana charge. On May 22, 1969, the judgment of sentence was affirmed, without opinion, in a per curiam decision by the Pennsylvania Superior Court, and on December 18, 1969, the Pennsylvania Supreme Court denied a petition for allowance of appeal. On February 18, 1970, petitioner filed this habeas corpus action.

Petitioner alleges that his Fourth Amendment rights were violated by an illegal search and seizure of a gun and a quantity of marihuana from his automobile. The items seized resulted in his indictment and conviction. Petitioner alleges that the search and seizure were illegal because the search warrant was without probable cause, and because it was based on information of an informant

whose identity the Commonwealth refused to disclose. With respect to the "probable cause" contention, petitioner states that the warrant was issued solely on the basis of an affidavit of a police officer that a confidential informant had told the police that petitioner had possessed and sold marihuana, and that there were no other underlying circumstances, the name of the informant or reasons for his reliability given to the magistrate.

Judge Follmer of this court issued a rule to show cause why the writ should not issue, and after an answer to the rule was filed, issued an order and secured the State court records.

Standing of Petitioner To Maintain Action. Petitioner is not now incarcerated. He has been continued on bail. In his petition he indicates that he is "presently awaiting for order to serve sentencing (sic)." It is now established that a habeas corpus action may be maintained to attack a sentence that is to be served in the future. Peyton v. Rowe, 1968, 391 U.S. 54, and that a person who is free on bail is in "custody," though not physical custody, so as to permit him to maintain the action. Burris v. Ryan, 7 Cir. 1968, 397 F. 2d 553. Cf. United States ex rel. Rybarik v. Maroney, 3 Cir. 1969, 406 F. 2d 1055.

Exhaustion of State Remedies. There is nothing to indicate that petitioner sought review of the State proceeding by the United States Supreme Court on certiorari. While some courts in the past have taken this as a ground for refusing to entertain a petition, it appears that this ground is no longer valid. United States ex rel. Bland v. Nenna, S.D. N.Y. 1968, 282 F. Supp. 754, aff'd. 2 Cir. 1968, 393 F. 2d 416. Cf. United States ex rel. Rundle v. Bennett, 3 Cir. 1969, 419 F. 2d 599.

Petitioner has not sought relief under Pennsylvania's Post-Conviction Hearing Act, 19 P.S. §1180-1 et seq. This would not bar his right to proceed on his claims in this court if the same claims were presented on direct appeal in the State courts. United States ex rel. Fletcher v. Maroney, 3 Cir. 1969, 413 F. 2d 16; United States ex rel. Bennett v. Rundle, 3 Cir. 1969, 419 F. 2d 599.

Although it appears that petitioner, by way of pretrial motions, presented the issues here raised to the trial court, the record indicates some question as to whether they were preserved for decision in post-trial motions and thus preserved for appellate review. Prior to trial, petitioner filed a motion to suppress in which he raised the matters herein complained of as well as other grounds for suppression of the evidence. A hearing was held at which Edward A. Slosky, a narcotic agent for the Pennsylvania Department of Health on whose affidavit the search warrant was issued, and Stephen R. Stefanides, the Justice of the Peace, who issued the warrant, testified to the basis for issuance of the warrant. At the conclusion of the hearing, counsel asked the court in a general way to sustain his written motions, and that the name of the confidential informant be disclosed. The trial judge was of the impression that counsel urged suppression only because the name of the informant was not disclosed. In a written opinion, the court held that the facts related by the affiant that a confidential informant advised that petitioner had possessed and sold marihuana on May 13, 1966 (six days before the offenses giving rise to the search and indictment), provided sufficient probable cause for the issuance of the warrant; that the informant was in no way connected with the events of May 19, 1966, which gave rise

to the indictment; and that the identity of the informant was not relevant to the defense.

Defense counsel later renewed his motion to suppress. Another hearing was held at which the same two witnesses who testified at the first hearing again testified. Defense counsel specified his grounds for the motions as follows:

> "If the Court please, at this time I again move that my motion to suppress the evidence as obtained in this search warrant be granted, for the following reasons: first of all, the application contained herein as identified by Mr. Slosky here, the narcotics agent, merely states that based upon reliable information from a confidential informant and verified that Theron Solomon possessed and sold marihuana and dangerous drugs and contraband on May 13th, 1966, the facts just produced by this witness who was the Commonwealth's witness support that Theron Solomon did not sell but rather one Daniel Salvaterra sold, there is not sufficient evidence here today to show any possession or control of any drug or narcotic by the Defendant in these proceedings, Theron Solomon.
>
> "By the Court: Anything further?
>
> "Mr. Daley: That plus the cases which we have cited today and the Commonwealth relies on.
>
> "By the Court: Well, don't cite your authority, I am familiar with those cases. Anything beyond that particular point?

"Mr. Daley: Just, your Honor, this, that there is not sufficient probable cause to fortify the oath or affirmation contained in this application.

"By the Court: All right, I have that.

"Mr. Daley: Or by the verbal testimony."

". . .

"By the Court: You renew your motion, do you have any additional reasons for it?

"Mr. Daley: Yes, your Honor, based upon all the testimony given here this morning and based upon the printed information given in the application for the warrant, based upon the verbal testimony herein, we don't have sufficient probably (sic) cause that the Defendant herein Theron Solomon possessed or sold marihuana on May 13, 1966. The only verbal testimony given to us today by Mr. Slosky from an alleged informant in which it was shown and was not proven by the Commonwealth that this informant was reliable or credible, was that one Daniel Salvaterra possessed and sold on May 13th, not that the individual defendant herein, Theron Solomon, sold and possessed and based upon this I feel that the Commonwealth has not made out probable cause for the issuance of this warrant and I request that the motion to suppress be granted."

The court denied the motion.

"By the Court: The Court finds as a finding of fact that on May 13th, 1966, a sale of marihuana was consummated between a confidential informant and one Daniel Salvaterra; that the sale surrounded

the extraction of the marihuana from the motor vehicle of the Defendant, Theron Solomon.

"The Court therefore finds as a conclusion of law, that there was probable cause for the issuance of the search warrant and denies the Defendant's motion to suppress and notes the Defendant an exception."

After he was found guilty of both charges, defendant moved the court to arrest judgment on the ground that there was insufficient evidence to sustain the charge, and for a new trial on the grounds that the verdict was against the evidence, against the weight of the evidence, and that the case should have been withdrawn from the jury on defendant's demurrer. While these general grounds did not mention the alleged illegality of the search and seizure, defendant reserved the right to file additional reasons for a new trial when the notes of testimony were transcribed. He apparently never formally filed any additional reasons, but at argument on the motions he raised the matters pertaining to the search. The trial court, in denying the motions, stated:

"Before rendering our final order, we call to the attention of the appellate court that although the defendant made reference to and argued at the time the post-trial motions were argued, matters pertaining to the search warrant, e.g., probable cause, and the right of the defendant to know the name of the confidential informant, these were never raised in his motion in arrest of judgment or his motion for a new trial even though he reserved unto himself the right to file additional reasons. We are not now disposed

to raise these questions for the defendant since the trial court indulged the defendant prior to trial in allowing not only one but two hearings on defendant's motion to suppress the evidence, to wit, marihuana and the gun, in order to make certain he had ample time and opportunity to explore the legality of the search warrant and all related matters. He has had full recourse to all avenues afforded him by law including now his right of appeal. We feel the matter should rest in the hands of the Honorable Appellate Court as it was presented to the trial court.

"Should the honorable appellate court deem it advisable to raise for the defendant that which he did not appropriately raise for himself before the lower court in his post-trial motions, the lower court has already expressed itself on these matters in its disposition of the defendant's motion to suppress the evidence. We make further reference to Commonwealth vs. Carter, 427 Pa. 53. There the facts raised a question of identity and the honorable appellate court concluded that disclosure of the name of the confidential informant was required as being helpful and relevant to the defense of the accused. The case also enunciates that disclosure of the name of the confidential informant depends on the circumstances of the case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony and other related factors. The only relevance of the confidential informant's testimony goes to the probable cause for issuance of the search warrant and has nothing to do with the defendant's defense. As a matter of

fact, the defendant did not offer any testimony whatsoever so that we do not know what his defense was, if any.

"We find no factors or circumstances in the case before us which brings the matter within the concept of Commonwealth vs. Carter, supra, and thus we would not alter our original position."

Thus, while the court was not disposed to consider the suppression question, it appears that it did.

Whether the appellate courts considered this question is not clear. Defense counsel raised the suppression question before the Pennsylvania Superior Court.[1] That court, in a per curiam decision without opinion, affirmed the judgment of sentence. It is not known, therefore, whether the Superior Court agreed with the trial court that the suppression question was not properly before the trial court on the post-trial motion, or whether it agreed with the trial court's holding on the suppression question. As noted previously, the Supreme Court of Pennsylvania denied, per curiam, a petition for allowance of appeal.

Assuming the failure of counsel to properly raise the suppression issue in his filed motions, this was a procedural default which would not necessarily bar federal habeas corpus relief provided there was no deliberate bypassing of the orderly procedure of the state courts. Mize v. Crouse, 10 Cir. 1968, 399 F. 2d 593. Petitioner did not deliberately waive the suppression questions; in fact,

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[1] The case was decided by the Superior Court on briefs without oral argument. Defendant's brief (Exhibit No. 1 at hearing held January 25, 1971, in the instant action) indicates that the suppression question was raised.

he urged them in oral argument on the post-trial motions and the trial judge, though indirectly, ruled against him. He urged them before the Superior Court. His route of direct appeal has been exhausted. Theoretically, he has available to him State post-conviction relief procedures under the Pennsylvania Post-Conviction Hearing Act, 19 P.S. §§1180-1 et seq. However, to be eligible for relief, he must show that he is incarcerated, or on parole or probation, 19 P.S. §1180-2. Since he is on bail, this relief is not now available. Under these circumstances, State remedies have been exhausted, 28 U.S.C.A. §2254; Fay v. Noia, 1963, 372 U.S. 391.

Requirement of Evidentiary Hearing in This Court. In Townsend v. Sain, 1963, 372 U.S. 293, 314, the Supreme Court of the United States enunciated the principles to be followed in determining whether an evidentiary hearing should be held. One of these principles dictates that where the state trier of fact has made no express findings of fact, a hearing should be held unless the district court is able to reconstruct the relevant findings of the state trier of fact. Here the facts found by the State court are discernible both from the written opinion following the first hearing, and the transcript of the second hearing. Only two witnesses testified and it is apparent that the State court accepted, in toto, their uncontradicted testimony. Petitioner's counsel had full opportunity to cross-examine the witnesses. At neither hearing did petitioner offer any evidence of his own. The uncontradicted testimony of the witnesses and the warrant formed the basis for the State court's ruling. Nevertheless, out of caution this court directed that a hearing be held. At the hearing the parties did not offer any evidence but relied

on the facts developed at the State hearings. A review of the State court records indicated, however, that some of the information furnished to Justice of the Peace Stefanides, who issued the search warrant, was not contained in the Search Warrant Complaint. Since the information in the Search Warrant Complaint was given under oath, this court held another hearing directed to whether the information not contained in the Search Warrant Complaint was given under oath to Stefanides. The testimony at the second hearing established, and this court so finds, that all information furnished to Stefanides, both oral and written, and particularly that given by Narcotics Agent Slosky, was given under oath.

The Merits. On May 19, 1966, Slosky appeared at the office of Justice of the Peace Stefanides and under oath made the following Search Warrant Complaint:

> "That based on a complaint and verification which he veribly (sic) believes to be true, that there is probable cause to believe, and just reasonable grounds believing and does believe that Marihuana and Dangerious (sic) Drugs and Contraband, that have no legal right or use, 'Contrary to Section 692, Section 4, Paragraph (q) of September 26, 1961, P. L. 1664.' are on the premises of one Theron Solomon Alias 'Rats', situated at 57 Dagobert Street, Wilkes-Barre, Penna. (described as a two story wooden frame building with green and asbestos siding). And or are in a 1964 tan-colored Oldsmobile Sedan bearing Pennsylvania Registration Plates No. N-21608, registered in the name of Theron Solomon, and or are in any motor vehicle occupied or operated by the said Theron Solomon Alias 'Rats'. And

based on reliable information from a confidential informat (sic) and verified that Theron Solomon Alias 'Rats' possessed and sold Marihuana, Dangerious (sic) Drugs and Contraband on May 13, 1966.

"Affiant therefore prays that a Search Warrant may issue to a proper officer directing him to search said place or thing and seize said thing or things."

The trial record shows that after obtaining the warrant, a surveillance detail consisting of four State Policemen, including Corporal Ray Peters, two Wilkes-Barre City detectives and two Department of Health Narcotics Agents, one of whom was Slosky, proceeded to South Main Street in Wilkes-Barre, near the parking lot adjacent to the Hanover National Bank. The detail split up into teams, which stationed themselves at various points on or adjacent to South Main Street. At 9:00 p.m. one team saw a Cadillac automobile driven by one Daniel Salvaterra with petitioner as a passenger leaving the Hanover National Bank parking lot. The team radioed another team to continue the surveillance. The Cadillac returned to the parking lot, and both men got out of the car and went over to petitioner's Oldsmobile automobile which was parked in the lot. One of the men opened the trunk of the Oldsmobile, did something which could not be seen, closed the trunk, and the men returned to the Cadillac. One of the men was "carrying something". The Cadillac again left the parking lot. Shortly after 11:00 p.m., the Cadillac again returned to the lot and the two teams were directed to accost the men and institute the search. The officers approached the Cadillac with Salvaterra and petitioner sitting in it. After obtaining identification, the officers told petitioner that they

had a warrant to search his car. Petitioner stated that his car was not there. One officer who knew that the Oldsmobile in the lot was petitioner's obtained petitioner's registration card and compared the data thereon to the identifying tags of the Oldsmobile. It was petitioner's car. The officers were unable to open the glove compartment or the trunk. Petitioner was asked for the keys, but he said he did not have them. The officers accompanied petitioner to his home and then to his brother's home in an effort to locate the keys, but petitioner claimed he was unsuccessful in locating them. The officers then drove the Oldsmobile to Sliker's Garage, a master key was obtained and the glove compartment and trunk were opened.

In the trunk the officers found a package containing marihuana, a small scale, and a measuring glass. The glove compartment contained a .22 caliber automatic revolver. It was on the basis of this evidence that petitioner was indicted, tried and convicted.

At the first State court hearing on the motion to suppress during which petitioner pressed only for the identity of the informant, it was developed only that Slosky informed Stefanides that "based on reliable information from a confidential informat (sic) and verified that Theron Solomon Alias 'Rats' possessed and sold Marihuana, Dangerious (sic) Drugs and Contraband on May 13, 1966," and that Slosky orally told Stefanides of information and circumstances underlying the search warrant complaint and informed Stefanides of matters to support the reliability of the information. What this oral information consisted of was not disclosed. At the second hearing, Slosky when asked what he orally told Stefa-

nides at the time he submitted the Search Warrant Complaint, testified:

"A. Well, I advised Mr. Stefanides that we had an informant who had purchased marihuana in the City of Wilkes-Barre on May the 13th, 1966, this informant had picked up one Daniel Salvaterra and had driven to a parking lot in South Wilkes-Barre where Mr. Salvaterra got out of our informant's car, went to a car, *a tan Oldsmobile driven by the Defendant, Mr. Solomon, picked up a package and delivered it back to our informant.*

"Q. If I might interrupt you, *this package was obtained by Mr. Salvaterra from the Defendant, Theron Solomon?*

"A. *This is correct.*

"Q. At the time of this transfer of this package Mr. Solomon was in what type of a car?

"A. He was in a tan Oldsmobile, according to the informant.

"Q. According to the informant, and did you later receive from the informant the particular package which he had received from Mr. Salvaterra?

"A. The package was turned over to the State Police.

"Q. To the State Police?

"A. Yes.

"Q. Did you come in contact with the package at all?

"A. I did.

"Q. Did you look into the package to determine what if any, what the the contents were?

"A. I examined the contents under a microscope *and found it to be marihuana.*"

. . .

"Q. Then based on information given to you by your informant, purchased approximately six days before the date you appeared before Squire Stefanides, you prepared this search warrant, is that correct?

"A. That's right.

"Q. Your application for search warrant, is that correct?

"A. That is correct.

"Q. *And this information which you just related to the Court was in fact told to Squire Stefanides on the evening that you presented your application?*

"A. *It was.*" (Emphasis supplied.)

Stefanides corroborated Slosky's testimony.

"Q. All right, you have been in Court this morning since we convened, have you not?

"A. Yes.

"Q. Whether or not you heard Mr. Slosky testify?

"A. Yes, sir, I did.

"Q. Whether or not this information coupled with the information which appears on the paper before you, was given to you by Mr. Slosky on the date of May the 19th, 1966?

"A. Yes, it was.

"Q. He informed you of the various circumstances or information which his confidential informant had given him?

"A. Yes, he did.

"Q. And the other information which appears on the complaint for search warrant, is that correct?

"A. That's correct.

"Q. And based on this information, both on the paper and orally received, whether or not you issued a search warrant?

"A. Yes, I did."

These facts were reflected in the State court's ultimate findings of fact, which this court accepts.

While this court may defer to the State court's findings, it may not defer to the State court's conclusions, but rather, must reach its own conclusions based on such facts. Turning first to the sufficiency of the Search Warrant Complaint, in Aguilar v. Texas, 1964, 378 U.S. 108, a search warrant had issued on an affidavit of police officers who swore only that they had "received reliable information from a credible person and do believe that heroin . . . and other narcotics . . . are being kept at the above described premises. . . ." The Supreme Court recognized that probable cause can be satisfied by hearsay information, but held the affidavit inadequate because (1) it did not set forth any of the "underlying circumstances" necessary to enable the magistrate independently to judge of the informant's conclusion that narcotics were where he said they were, and (2) the affiant-officers did not attempt to support their claim that their informant was "credible" or his information "reliable". In Spinelli

v. United States, 1969, 393 U.S. 410, the Supreme Court in applying the principles of Aguilar held insufficient an affidavit, based on an informant's tip, because it did not satisfy the two criteria laid down in Aguilar. In applying the test of Aguilar, the Court stated at page 416:

> "Applying these principles to the present case, we first consider the weight to be given the informer's tip when it is considered apart from the rest of the affidavit. It is clear that a Commissioner could not credit it without abdicating his constitutional function. Though the affiant swore that his confidant was 'reliable,' he offered the magistrate no reason in support of this conclusion. Perhaps even more important is the fact that Aguilar's other test has not been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was runnings a bookmaking operation. We are not told how the FBI's source received his information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable. Cf. Jaben v. United States, 381 U.S. 214 (1965). In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

The Supreme Court indicated, however, that its reference to the "two-pronged" test of Aguilar should not be understood as meaning that an affidavit deficient in these respects is necessarily inadequate to support a search warrant; other facts and circumstances may be attested which will supply the evidence of probable cause necessary to support the warrant. [2]

The courts are divided as to whether the matters set forth in the affidavit must be the exclusive support for the warrant. Some courts have recognized the validity of State procedure which permits the information contained in the affidavit to be supplemented by what the officer told the magistrate when the warrant was secured, in determining whether there was probable cause. Miller v. Sigler, 8 Cir. 1965, 353 F. 2d 424. Some courts have found support for this approach in the language of Aguilar. Gillespie v. United States, 8 Cir. 1966, 368 F. 2d 1. Even after Aguilar, however, the Third Circuit held that the affidavit must be the exclusive support for the warrant. United States v. Sterling, 3 Cir. 1966, 369 F. 2d 799. The Sterling case, however, involved a federal warrant. In United States ex rel. Boyance v. Myers, E.D. Pa. 1967, 270 F. Supp. 734, the court, relying on Gillespie, Sigler, and Ker v. California, 1963, 374 U.S. 23, considered oral testimony as well as the affidavit, noting that Pennsylvania permits the use of oral testimony presented to the judicial officer to support the issuance of a warrant. [3] The Third Circuit reversed on other grounds, but

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[2] See dissenting opinion of Mr. Justice Fortas, Spinelli v. United States, 1969, 393 U.S. 410 at pp. 435, 438.

[3] Commonwealth v. Crawley, 1966, 209 Pa. Superior 70.

stated, however, "We do not reach the point urged by the appellant that unrecorded oral statements to the magistrate may not be the basis for a finding of probable cause to issue a warrant." United States ex rel. Boyance v. Myers, 3 Cir. 1968, 398 F. 2d 896 n. 1. In Com. of Pa. ex rel. Feiling v. Sincavage, W.D. Pa. 1970, 313 F. Supp. 967, the court held that oral testimony as well as affidavit in writing, may serve as the basis for issuance of a warrant under constitutional standards. The court of appeals affirmed apparently because it was not necessary to reach this point. Com. of Pa. ex rel. Feiling v. Sincavage, 3 Cir. 1971, 439 F. 2d 1133. In Christofferson v. Washington, 1969, 393 U.S. 1090, the Supreme Court of the United States denied certiorari in a State of Washington case where this procedure was employed. In a dissent, joined in by Mr. Justice Marshall, Mr. Justice Brennan indicated that such a procedure raised substantial constitutional issues, and that he would, therefore, grant the petition. This court is persuaded that such a State procedure is permissible.

The combined information of the affidavit and sworn testimony before Stefanides demonstrates the existence of probable cause for the issuance of the warrant. Stefanides was informed both of the underlying circumstances to independently judge the informant's conclusion that the narcotics were where he said they were, and the circumstances demonstrating credibility of the informant and the reliability of his information. About a week before the search warrant was issued, the informant had actually purchased marihuana which had been obtained by Salvaterra from defendant who was seated in a tan Oldsmobile. The informant had personally observed the trans-

fer of the package from defendant to Salvaterra. The informant turned the marihuana over to Slosky who examined it and found it to be, in fact, marihuana. Not only would the fact that it was marihuana attest to the informant's reliability and credibility, but also, there being nothing in the record to the contrary, the informant's admission that he purchased marihuana was against his own penal interest and therefore was proof of his reliability. United States v. Harris, 1971, 403 U.S. 573; United States ex rel. DiRienzo v. Yeager, 3 Cir. 1971, 443 F. 2d 228. Slosky stated in the affidavit that he had verified the information supplied by the informant. It is apparent that he did. He analyzed the contents of the package and found it to be marihuana, and verified that defendant owned a tan Oldsmobile, its plate number, defendant's address, etc. All of this information was given to Stefanides under oath. The information given was sufficient to support the issuance of the warrant. United States v. Harris, supra; United States ex rel. DiRienzo v. Yeager, supra; United States ex rel. Henderson v. Mazurkiewicz, 3 Cir. 1971, 443 F. 2d 1135.

Defendant also contends that he was entitled to the disclosure of the identity of the informer "who was an eyewitness to the crime allegedly committed by petitioner, and on whose information the search warrant was improperly issued." It should be noted that petitioner was not tried and convicted on the transaction which was witnessed by the informer. This transaction furnished the basis for the later search warrant by means of which the police officers found the contraband which resulted in the conviction. Petitioner asserts in a nebulous way that the disclosure would have been helpful in the preparation of

petitioner's case. But whatever help this may have furnished petitioner must be viewed in the light of the privilege of nondisclosure. Under the circumstances, this court finds that the informer's identity need not have been disclosed. McCray v. Illinois, 1967, 386 U.S. 300; Rovario v. United States, 1957, 353 U.S. 53; cf. Com. v. Carter, 1967, 427 Pa. 53.

This memorandum is filed in support of the order of this court, filed December 31, 1971, which denied the petition for a writ of habeas corpus.

(s) Michael H. Sheridan
Chief Judge
Middle District of Pennsylvania

Dated: March 16, 1972.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 72-1286

UNITED STATES OF AMERICA
ex rel. THERON SOLOMON,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued April 26, 1973

Before VAN DUSEN, ADLISERT and ROSENN,
Circuit Judges

JUDGMENT ORDER

After consideration of (A) the contentions of appellant that

(I) the Fourth Amendment may not permit a state magistrate to establish probable cause for a search warrant based on unrecorded oral testimony supporting a state agent's otherwise inadequate written search warrant complaint,[1]

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1. See United States ex rel. Gaugler v. Brierley, ___F. 2d___ (3d Cir. No. 72-1262, Opinion of April 16, 1973).

(II) the oral testimony and search warrant complaint in concert failed to establish probable cause for a search warrant of appellant's car for: (a) absence of underlying circumstances which led the informant to conclude narcotics were where he claimed; and (b) absence of underlying circumstances from which the state agent concluded the informant was reliable, and

(III) the appellant is entitled to the identity of the informant whose information was the basis for a search warrant of appellant's car where disclosure would assist in determining the accuracy of the factual avermen's for the search warrant;

(B) the briefs of counsel; and (C) the record;

It is ORDERED AND ADJUDGED that the December 31, 1971, district court order is affirmed, with costs to appellee. See United States ex rel. Solomon v. Commonwealth, Opinion of 3/16/72 (Civil No. 1168, M.D. Pa.).

BY THE COURT:

/s/ Van Dusen
Circuit Judge

Dated: April 27, 1973

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 72-1286

UNITED STATES OF AMERICA
ex rel. THERON SOLOMON,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER and WEIS, Circuit Judges.

The Petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Van Dusen
J.

Dated: May 31, 1973

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

United States of America :
Ex Rel. Theron Soloman,
:
Petitioner,
:
Commonwealth of Pennsylvania, : No. 1168 Habeas Corpus

Respondent.:

:

ORDER

It is ORDERED that a hearing in the above captioned matter is set for Thursday, September 23, 1971, at 2:00 p.m., E.D.S.T., at the United States Court House, 197 South Main Street, Wilkes-Barre, Pennsylvania, on the issue of whether or not the officers who appeared before Justice of the Peace Stephen R. Stefanides on May 19, 1966, were under oath when they informed him of matters not appearing in the search warrant complaint.

s/Michael J. Sheridan

Chief Judge
Middle District of
Pennsylvania

Dated: September 16, 1971.

Exhibit "A"

MINUTES OF TRIAL OR HEARING

THERON SOLOMAN

Case No. 1168 Habeas Corpus
Date: September 23, 1971

v.

____day of Trial of Hearing

COMMONWEALTH OF PENNSYLVANIA

(Filed September 23, 1971)

Hon. Michael H. Sheridan Presiding, Wilkes-Barre, in Open Court

Nature of Hearing - on issue whether (sic) or not the officers who appeared before Justice of the Peace were under oath when search warrant was prepared.

Time commenced 2:10 p.m. Time terminated - 3:10 p.m.

Appearances

Plaintiff:	Defendant:
1. F. Charles Petrillo	2. Mary Cooper

Plaintiff's Witnesses:	Defendant's Witnesses:
(none)	Stephen R. Stefanides Exam'd 2
	Cross Exam'd 1
	Edward A. Slosky Exam'd 2
	Cross Exam'd 1
	(Court)
	Stephen R. Stefanides Exam'd
	(Court)

Remarks: Attorney Petrillo makes oral motion that Mr. Stefanides and Mr. Slosky be sequestered. Motion granted.

Exhibit D-1 Complaint for Search Warrant on one Theron Soloman. Admitted into evidence. Mr. Petrillo makes statement to the Court, taken under advisement.

T. Harold Campion, Clerk

s/Mulholland, Deputy

s/John Butler, Reporter

Exhibit "E"